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IN THE

Supreme Court of the United States

October Term, 1967.

No. 528.

MARION J. BERGUIDO, Individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of CARLOS BERGUIDO, JR., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, 3rd, by Their Guardian, Marion J. Berguido,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI AND PETITION FOR SUCH REHEARING.

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Motion for Leave to File Second Petition for Rehearing of Order Denying Writ of Certiorari and Petition for Such Rehearing.

MARION J. BERGUIDO, Individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, 3rd by their Guardian, Marion J. Berguido, Petitioners, respectfully move for leave to file a second petition for rehearing of an order denying writ of certiorari and represent as follows:

1. That they are the petitioners in No. 528, October Term, 1967 in this Honorable Court in which action their petition for certiorari was denied and their petition for rehearing of that order denying the writ of certiorari was also denied on Monday, May 6, 1968.

2. This case involves the effect and significance of the failure of a commercial airline to provide an adequately informative legible passenger ticket in an international flight which by the requirements of Chapter 2, Article 3(1) of the Warsaw Convention must give to the passenger instant notice and understanding of the financial limitations of the Warsaw Convention as well as stating specifically how many stops and where the plane proposes to make them so that the passenger is fully aware of the risks to which he is being submitted. This is of the greatest importance since most crashes occur on take-off or landing.

3. To the extent that this case and *Alitalia-Linee Aeree Italiane, S. P. A. v. John Lisi,* October Term, 1967, No. 70 decided on March 25, 1968 by an equally divided court with Mr. Justice Marshall not participating because as Solicitor General he was on a memorandum for the United States as amicus curiae, discuss the question of the effect of small print on a ticket, they are identical and indistinguishable.

4. The net result of the court's rulings in *Lisi, supra* and the instant one is that faced with precisely the same legal question in both cases, the passenger in *Lisi, supra* which came here from the United States Court of Appeals for the Second Circuit will prevail, whereas the widow and children of the passenger in the instant case (*Berguido*) out of the Third Circuit will be denied any recovery for their innocent decedent's death. All fairminded men must viscerally react most severely to such patently unfair diverse results. Both should win or both should lose.

5. In our original Petition for Rehearing at page 6 we vigorously argued that there was no reason why *Berguido* (instant case) should not have been heard and considered separately since in this case Mr. Justice Marshall at no time and in no way participated therein and therefore was free to and should have acted to help resolve this issue presented by both cases—a result not attained by *Lisi*. We cited in support thereof *United States v. Hoffa*, 382 F. 2d 856, 861 (C. A. 6, 1967); *Edwards v. United States*, 334 F. 2d 360, 362-3 (C. A. 5, 1964) and *In re Union Leader Corp.*, 292 F. 2d 381, 391 (C. A. 1, 1961).

6. In that same Petition for Rehearing we brought to the Court's attention the fact that in the instant case the United States Court of Appeals for the Third Circuit *considered but did not decide* the ticket issue involved in both cases because it went off on a completely erroneous understanding of the way that the Warsaw Convention works when it said:

> "The District Court . . . as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. *If this conclusion is supportable, it is final and there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention* [which specifies the require-

ments of a Warsaw ticket] . . . ." 369 F. 2d 874, 879 (C. A. 3, 1966). Emphasis supplied.

That the Third Circuit did not decide the ticket issue is confirmed in 36 Law Week, 3373 (3/26/68). On its face that holding was wrong. The Solicitor General of the United States agreed with us and so told this Court in his memo in this case to this Court and recommended remand.

7. In our Petition for Rehearing of the order denying the writ of certiorari, this family did not ask that this court decide that issue by granting certiorari to resolve this issue then and there. It only requested that this court remand the case back to the Third Circuit so that the petitioners would at least be allowed their absolute right to have the critical ticket issue in the case ruled on by the Court of Appeals. Certainly that is a right which is not similar to the rule governing certiorari where this Court may decide in a particular case that as a matter of judicial discretion it is not timely or important to hear it then. This absolute right to a ruling on the critical ticket issue by the Court of Appeals however is different and it has been denied to your petitioners. It never reached it. And this was due to its complete miscomprehension of the Warsaw Convention itself and how it works.

8. When *Lisi, supra* was argued before this Court on March 11, 1968, the issue before the court was the adequacy of the ticket involved in *Lisi, supra.* But the bland statement of the issue does not reveal its true nature. The question must be broken down into its component parts. This Court thought so too. Practically every member of this Court, from the bench peppered counsel with questions in respect to the several phases of the general question on

which the adequacy of the ticket may turn. This Court wanted to know the following:

(a) Was the ticket defective because it was printed in such a manner that it was illegible; and

(b) Was the ticket defective because it did not comply with Chapter 2, Article 3(1c) of the Warsaw Convention in respect to whether the ticket contained on it the agreed stopping places; and

(c) Was the ticket defective because it failed to tell the passenger in plain simple language that the financial limitation of damages under Warsaw was $8,350 and hence was a mere reference in the ticket to the Convention in general terms sufficient.

Only counsel for the passenger in *Lisi* was permitted to argue the viewpoint of passengers under Warsaw tickets.* He decided as a strategy move that he should take a calculated risk and limit this Court's consideration of the adequacy of the ticket in his case to a determination of whether the ticket was legible or not.** The Court's hands having been so tied by counsel, the court reviewed only the legal effect of using the small print on the tickets.

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* Your petitioner had sought before the disposition of the Writ of Certiorari in No. 70 [Lisi] to consolidate their case with *Lisi*, so that they could prevent the foreclosure of step by step analysis of each of the aforementioned components of the adequacy of the ticket issue which counsel in *Lisi* succeeded in attaining as part of his appellate strategy. It was denied. Your petitioners were thus deprived of their right to have their own counsel state their view of *all* these points of law which their ticket raised. Being thus estopped by Counsel for *Lisi*, the Court never reached those issues and heard from no one about them. They still await decision.

** Naturally airline counsel was delighted to agree to such a narrowed consideration of the adequacy issue.

Various members of this Court from the bench commented that they could physically read the ticket. On *that* issue solely and alone, this Court split evenly. It never reached (b) and (c) *supra,* raised by us in our Petition for Certiorari because it was foreclosed by *Lisi* counsel from doing so. But your petitioners in this case have always considered (b) and (c) of overriding importance in this case and therefore briefed them in detail. In the instant case the ticket involved did not contain a warning that this plane was going to make a stop at Jacksonville, Florida, the very place where the accident occurred, in complete violation of Article 3(1c). Thus petitioner's decedent's risk of an accident was increased *unilaterally* by thirty-three and one-third (33⅓) per cent. In our case the ticket contained no warning whatsoever that it was controlled by a limitation of $8350 or of any particular amount under the terms of the Warsaw Convention. We are confident that had the four justices of this Court who ruled against the passenger in *Lisi* had a chance to decide the effect of these other inadequacies (b) and (c) of the ticket, that there would have been a unanimous decision that in those respects a ticket so delivered did not comply with the Convention. Those points remain to be decided. Indeed even the effect of illegible print on a ticket is not actually decided by *Lisi.* It has been held that a decision of an evenly divided court decides nothing.

Obviously by granting Certiorari in *Lisi* this court showed that it thought that the problems generated by Warsaw Convention tickets in international air flight needed review at this time. But unfortunately *Lisi* decided nothing. The same need remains unresolved. It is only fair therefore that *Berguido* [instant case] be remanded to the Third Circuit for decision so that it may in due course after consideration there, return here when all the major

questions present in Warsaw litigation can be properly and totally considered and decided. *Berguido* raises all of them.***

*** The abortive certiorari granted and argument thereon in *Lisi* has proven fruitless. None of the basic points of law in Warsaw which prompted grant of certiorari were resolved. They still await decision. The need is still unfulfilled. Perhaps the result in *Lisi* is, we respectfully submit, a happy one for it was a poor case for consideration by the Court in the posture in which it came before the Court. Counsel for the passenger had tied the Court's hands by the narrowness of the area on which he sought review. A far more nutritive case is *Berguido* [instant case]. It raises each and every fundamental point of law which Warsaw can present, with the exception of whether charter flights are within the scope of Warsaw. That problem will be taken care of in *Block v. Compagnie Nationale Air France,* 229 F. Supp. 801 (D. C. N. D. Ga. 1964) U. S. S. Ct. docket #1089, March 25, 1968 in which this Court has recently asked for the views of the Solicitor General. Here are the points that *Berguido* directly raises and on which petitioner's counsel seeks resolution:

1. If the ticket is inadequate, is there not absolute liability on the carrier without regard to proof of negligence or wilful misconduct?

2. Is a ticket inadequate in which the print is too small to read?

3. Assuming that the print on the ticket is legible, is it not also required that the attempted limitation of damages under Warsaw be printed not merely legibly, but also in emphasis so as to attract attention to the limitation by putting it in larger print or by off-set printing or different coloring? See *Maize v. Atlantic Refining Co.,* 352 Pa. 51, 55, 41 A. 2d 850, 160 ALR 449.

4. Is not a ticket which merely states that it is subject to the limitations of the Warsaw Convention inadequate because it does not state specifically in dollars just what the limitation is? See *Lachs v. Fidelity & Casualty Co. of New York,* 306 N. Y. 357 (1954).

5. Is not a ticket as a matter of contract law inadequate which fails to comply with the requirement of the Convention that "agreed stopping places" be specifically noted thereon? Must not there be a bilateral agreement before the passenger can be subjected to the greater risk of harm when a not scheduled extra stop is made? After all most crashes occur on take-off or landing.

The Berguido family should not be cast off into forgotten limbo never to be heard, while the controlling issues await a new case some day in the future for resolution where they, but not the Berguidos, may receive their just due. *Berguido* is in point of time the next case docketed in this Court raising these issues. It is entitled to become the deciding case since no decision can be reached in *Lisi* due to the posture of the legal problems presented and the prior connection of Mr. Justice Marshall with it. Hence *Berguido* should not be passed over.

The present status of these two cases (*Lisi* and *Berguido*) must and does leave fairminded men with a gnawing inward sense of shock at its patently unfair posture. It is not right that the passenger in *Lisi* can win and the passender in *Berguido* must lose. This just cannot be due process.

WHEREFORE the petitioners respectfully submit that the learned Judges of the Court of Appeals for the Third Circuit in its decision of this case, 369 F. 2d 874 (1966) did eroneously and/or intentionally and/or arbitrarily refuse to consider and decide the basic question directly and inextricably involved in this case, to wit: the effect of an inadequate Warsaw ticket so as to render it a non-compliance with the delivery clauses of the Warsaw Convention. They do therefore pray that this Petition and Motion be granted and that certiorari be granted and the case be remanded to the United States Court of Appeals for the Third Circuit with specific directions that they consider and decide these important and pressing points of law which prompted this Court to grant certiorari in *Lisi, supra.*

Respectfully submitted,

B. N. RICHTER,
Attorney for Petitioners.